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KOEY SHER LING

v.

SANCTUARY MANAGEMENT CORPORATION SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J
[CIVIL APPEAL NO: R1-12B-595-07]
30 NOVEMBER 2010

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CIVIL PROCEDURE: *Locus standi - Claim by respondent against registered unit owner - Sale and purchase agreement between developer and registered unit owner - Whether only parties to the contract can sue - Whether respondent appointed by developer to manage and maintain condominium - Authority of - Whether respondent had locus standi to file*

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action against registered unit owner - Whether respondent entitled to demand expenses/charges for renovation works - Terms of Deed of Mutual Covenant, ss. 8.04 & 8.08

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Locus standi - Claim by respondent against registered unit owner - Sale and purchase agreement between developer and registered unit owner - Whether only parties to the contract can sue - Whether respondent appointed by developer to manage and maintain condominium - Authority of - Whether respondent had locus standi to file action against registered unit owner - Whether respondent entitled to demand expenses/charges for renovation works - Terms of Deed of Mutual Covenant, ss. 8.04 & 8.08*

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CONTRACT: *Agency - Extent of agent's authority - Claim by respondent against registered unit owner - Sale and purchase agreement between developer and registered unit owner - Whether only parties to the contract can sue - Whether respondent appointed by developer as mere agent to collect service charges, maintenance and other related charges - Authority of - Whether respondent had locus standi to file action against registered unit owner - Whether respondent entitled to demand expenses/ charges for renovation works - Terms of Deed of Mutual Covenant, s. 8.04 - Contracts Act 1950, s. 141*

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The appellant entered into a Sale and Purchase Agreement ('the SPA') and a Deed of Mutual Covenants ('the DOMC') both dated 17 January 1996 with the developer to purchase one unit of condominium at the Bukit Tunku Condominium ('the Sanctuary'). The developer had appointed the respondent to take over the role of management and maintenance of the Sanctuary with effect from 1 January 2002. The respondent averred that from that date, the respondent was fully authorised to collect service charges and maintenance charges/insurance/sinking fund etc and all expenditure/expenses incurred in the day to day operation and management of the Sanctuary on behalf of the developer. The respondent further contended that as at 10 February 2004, the appellant owed the sum of RM35,125.86 being charges for the works carried out to the common property of the Sanctuary. Since the appellant had failed, neglected and/or refused to pay the said charges, the respondent filed a suit against the appellant wherein the sessions court gave judgment in favour of the respondent. The learned sessions court judge found, *inter alia*, that (a) the respondent had been properly appointed and had the power to adopt any legal process towards recovery of unpaid debt which an agent was authorised to collect pursuant to s. 141 of the Contracts Act 1950 ('the Act') and (ii) the developer's letter dated 30 August 2006 ('the said letter'), which was issued two years after this suit was filed, confirmed irrevocably that the respondent would be fully responsible to collect the relevant charges including renovation costs. Dissatisfied with the said decision, the appellant appealed to this court. The issues that arose for determination herein were (i) whether the respondent had *locus standi* to file this action against the appellant and (ii) whether the respondent was entitled to recover from the appellant the expenses/charges incurred in respect of the renovation works.

Held (allowing the appeal with costs):

(1) The operation, powers and duties of the management corporation were specified under s. 8.04 of the DOMC and there was no provision in the said s. 8.04 which authorised the respondent to institute any legal action for and on behalf of the developer. Further, the learned sessions court judge's reliance on s. 141 of the Act was incorrect. (paras 8 & 9)

(2) The learned sessions court judge had failed to appreciate and had not given consideration to the fact that the said letter was issued long after commencement of this suit and was not a contemporaneous document. Besides, there was no consideration made on its evidential value. (para 10)

(3) The DOMC was entered into between the appellant and the developer. Thus, only parties to the DOMC could sue under it. The respondent, being appointed merely as the developer's agent to collect service charges, maintenance and other related charges as specified under s. 8.04 of the DOMC, had no *locus standi* to sue the appellant in its own name to recover payment of charges which was allegedly due and payable to the developer. (para 11)

(4) The renovation works were undertaken by 'the Sanctuary House Owners' Committee' and not by the developer pursuant to s. 8.08 of the DOMC. Thus, the expenses/charges incurred in respect of the renovation works were due to the Sanctuary owners/resident committee and not the developer. On that basis, the respondent had no *locus* and could not recover these charges from the appellant. (para 13)

Case(s) referred to:
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534 HC ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Datuk Eric Taylor v. Lim Foo Yong & Sons Realty Sdn Bhd [1990] 1 CLJ 415; [1990] 1 CLJ (Rep) 86 SC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 141

For the appellant - HK Ho; M/s Ho & Ho
For the respondent - Cheryl Kwan; M/s Rosley Zechariah

Reported by Kumitha Abdul Majid

JUDGMENT

Aziah Ali J:

[1] The appellant (the defendant in the court below) entered into a Sale and Purchase Agreement ("the SPA") and a Deed of Mutual Covenants ("the DOMC") both dated 17 January 1996 with Lindisfarne Heights Sdn Bhd ("the developer") to purchase one (1) unit of condominium apartment known as Unit No. AP#6 at Level 3 Bukit Tunku Condominium ("The Sanctuary") with a postal address at 15-3-2, The Sanctuary, 15 Tinggian Tunku, Bukit Tunku, 50480 Kuala Lumpur ("the property").

[2] On 15 January 2002, the developer appointed the respondent (the plaintiff in the court below) to take over the role of management and maintenance of The Sanctuary with effect from 1 January 2002 (para. 7 of statement of claim). The respondent avers that from that date, the respondent was fully authorized to collect service charges and maintenance charges/ insurance/sinking fund etc and all expenditure/ expenses incurred in the day to day operation and management of The Sanctuary on behalf of the developer (para. 8 statement of claim). From that date onwards, the respondent has been issuing invoices, statement of accounts and collecting the relevant charges and funds from the respective purchasers of the units in The Sanctuary including from the appellant.

[3] The respondent says that as at 10 February 2004 the appellant owes the sum of RM36,125.86 being charges for the works carried out to the common property of The Sanctuary which the majority of the purchasers agreed and consented to. Despite several reminders the respondent says that the appellant has failed, neglected and/or refused to pay the said charges. Therefore the respondent claims the sum of RM36,125.86 as at 10 February 2004 and such other charges accruing and payable by the appellant from 11 February 2004, interests and costs. The learned Sessions Court judge gave judgment in favour of the respondent. The appellant appeals against the said decision. I allowed the appeal with costs of RM3,000 to the appellant.

[4] At the Sessions Court the issues for determination are as follows:

(a) whether the respondent had the *locus* to file this action against the appellant,

and if the answer is positive

(b) whether the respondent was entitled to demand the renovation charges, late payment charges and the reconnection charges from the appellant.

Issue Of The Respondent's *Locus Standi* To File This Action

[5] For the appellant counsel submits that the parties to the SPA and DOMC are the appellant and the developer. The claim against the appellant is premised on these two agreements and is a claim in contract. The respondent came into existence long after these two agreements were entered on 17 January 1996 by the

A appellant and the developer. There is no privity of contract between the appellant and the respondent. Counsel submits that the respondent was trying to enforce terms of contract to which the respondent is not a party. Thus the respondent has no *locus* to commence this action against the appellant. It is submitted that
B the respondent as the developer's agent has no authority or right to sue the appellant (*Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; *Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988]
C 1 CLJ 346; [1988] 1 CLJ (Rep) 534; *Datuk Eric Taylor v. Lim Foo Yong & Sons Realty Sdn Bhd* [1990] 1 CLJ 415; [1990] 1 CLJ (Rep) 86).

[6] For the respondent it is submitted that sections 8.02 of the
D DOMC allows the developer to delegate its rights and duties to maintain and manage the common property and to collect the maintenance and other charges from the purchasers to any corporation or third party. In exercise of such right, by a letter dated 15 January 2002 the developer appointed the respondent as
E its agent.

[7] The learned Sessions Court judge found as follows:

(a) the respondent having been properly appointed and having the authority to act has the power to adopt any legal process
F towards recovery of unpaid debt which an agent is authorized to collect (s. 141 of the Contracts Act 1950);

(b) the appellant had made payments to the respondent towards maintenance charges, sinking fund, insurance charges and for
G water supply therefore there was a direct contractual relationship between the appellant and the respondent therefore the respondent has *locus* to file the suit.

(c) the developer's letter dated 30 August 2006 which confirmed
H irrevocably that the respondent would be fully responsible to collect the relevant charges including renovation costs. In the said letter the developer confirmed that the respondent was fully entitled to initiate legal proceedings in the respondent's own name.

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[8] Section 8.02 of the DOMC states as follows: A

> Section 8.02 Duties Of Vendor Prior To Formation Of Management Corporation
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> All duties and functions to be performed by the Management Corporation under the Strata Titles Act, 1985 or by the provisions herein contained shall prior to its formation to be performed by the Vendor or any corporation or manager appointed by the Vendor to perform such duties and functions. B

The operation, powers and duties of the management corporation are specified under section 8.04 of the DOMC. I do not find any provision in section 8.04 of the DOMC authorizing the respondent to institute any legal action for and on behalf of the developer. C

[9] The learned Sessions Court judge relied on s. 141 of the Contracts Act 1950 and illustration (a) to the said provision and the developer's letter dated 30 August 2006 as conferring authority on the respondent to institute legal action to recover payment for and on behalf of the developer. Section 141 provides as follows: D

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> **141. Extent of agent's authority.**
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> (1) An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do the act.
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> F
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> (2) An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.
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> ILLUSTRATIONS
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> (a) A is employed by B, residing in London, to recover at Telok Anson a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

In respect of the Illustration (a) to s. 141 referred to by the learned Sessions Court judge, it is clear that in the said Illustration, 'A' employed 'B' to recover the debt. That is not the case in the present action. On the facts the learned Sessions Court judge's reliance on s. 141 is incorrect. H

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[10] The learned Sessions Court judge accepted the developer's letter which was issued two years after this suit was filed. The learned Sessions Court judge has failed to appreciate and has not given consideration to the fact that this letter was issued long after commencement of this suit and is not a contemporaneous document. There is no consideration made on its evidential value.

[11] Notwithstanding the developer's letter, it is an undisputed fact that the DOMC was entered into between the appellant and the developer. Thus only parties to the DOMC can sue under it. I agree with the appellant's counsel that the respondent, being appointed merely as the developer's agent to collect service charges, maintenance and other related charges as specified under section 8.04 of the DOMC, has no *locus standi* to sue the appellant in its own name to recover payment of charges allegedly due and payable to the developer. Therefore the answer to the first issue is in the negative.

[12] Notwithstanding my finding above, I decided to proceed to deal with the issue of the recovery from the appellant the expenses/charges incurred in respect of the renovation works. For renovations to be carried out to the common property, section 8.08 of the DOMC expressly provides that whenever in the judgment of the developer, the common property shall require additions, alterations or improvements and the making of such additions, alterations or improvements shall have been approved by a majority of the purchasers of the units at The Sanctuary, the developer shall proceed with such additions, alterations or improvements to the common property. Section 8.08 of the DOMC which provides as follows:

> Section 8.08 Additions, Alterations Or Improvements To The Common Property
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> Whenever in the judgement of the Vendor or the Management Corporation, the Common Property, or any of them, shall require additions, alterations or improvements and the making of such additions, alterations or improvements shall have been approved by:
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> (i) A majority of the purchasers and permitted assigns present; and
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> (ii) a voting at a meeting in which a quorum is present,

(iii) The Vendor or the Management Corporation shall proceed with such additions, alterations or improvements to such common property.

[13] The renovation works were undertaken by 'the Sanctuary House Owners' Committee' and not the developer. This is evident from the developer's letter dated 9 April 2001 (p. 165 of the Appeal Record) which was written in response to the query by the appellant's solicitors on whether the developer had sanctioned/ approved and/or consented to the renovation works undertaken by 'the Sanctuary Owners/Resident Committee'. In the letter of reply the developer states as follows:

> ... the money collected for the renovation works is entirely independent from the Developer's Account for the maintenance / management fees. As such, our approval and/or consent may not be required.

Thus it is clear that insofar as the developer is concerned these renovation works were not carried out by the developer pursuant to cl. 8.08 of the DOMC. The expenses/charges incurred in respect of the renovation works are due to the Sanctuary Owners/ Resident Committee and not the Developer. On that basis the respondent cannot rely on cl. 8.08 to recover these charges from the appellant. Hence the respondent has no *locus* to claim payment of the expenses/charges incurred in respect of the renovation works which were not carried out under section 8.08 of the DOMC. For the reasons stated above I allowed the appeal with costs of RM3,000 to the appellant.